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Martha S. Wells v. Fetzer Refrigerator Company

Appellee's Brief 1976-SC-0042

APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

No. 76-42

1971

MARTHA S. WELLS - - - - - **Appellant**

versus

FETZER REFRIGERATOR COMPANY - **Appellee**

APPEAL FROM THE JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, SEVENTH DIVISION
HON. THOMAS A. BALLANTINE, JR., JUDGE

BRIEF FOR APPELLEE

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This is to certify that a copy of this brief has been served on Mr. Frank J. Dougherty, Jr., Mr. Foster L. Haunz, and Hon. Thomas A. Ballantine, Jr., Circuit Court Judge pursuant to RAP 1.250.

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STATEMENT OF THE QUESTIONS PRESENTED

The questions involved on appeal appear to have been correctly stated by the appellant.

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BRIEF FOR APPELLEE

May it please the Court:

COUNTERSTATEMENT OF THE CASE

A. Statement of the Nature of the Proceeding

This is an appeal by Martha S. Wells (formerly Martha S. Fetzer and Martha S. Hartman) from a verdict and judgment dismissing her suit against the appellee for money allegedly due her under a personal service contract between her late husband and the appellee.

B. Statement of the Facts

(It should be noted that the appellant has failed to include in her Statement of Facts any "page references to the record and the transcript of testimony", as required by RAP 1.210 (a) (3) (b). This should be fatal to her appeal, under the provisions of RAP 1.260-(a).)

This matter is before the Court for the second time. In a previous appeal,[1] this Court reversed a summary judgment in favor of the widow (now Mrs. Martha S. Wells), stating,

> "As the cause of death is not shown by the record, it is necessary that these facts be established by the trial court. The pleading by Fetzer Refrigerator Company that Norris commited suicide presented a factual situation to the Court which was not resolved, . . ." *Supra,* 512 S. W. 2d at 940.

Pursuant to this Court's mandate, a three-day trial was held on June 4-6, 1975, at which the following facts were adduced: The decedent, Norris A. Fetzer (hereafter referred to as "decedent"), died on November 24, 1970 (TE 171-174). At the time of his death, the decedent had been employed by the appellee, Fetzer Refrigerator Company, for over twenty-two years (TE 38) and was its secretary, while his brother, C. Lamar Fetzer, was vice president, and his father, Clifford L. Fetzer, was president. In addition, the decedent was active in two other family corporations: He was president of the Fetzer Corporation (TE 193), which was

[1] *Fetzer Refrigerator Company* v. *Martha S. Fetzer (a/k/a Martha S. Hartman and Martha S. Wells)*, Ky., 512 S. W. 2d 938.

primarily a contracting company (TE 37), and the decedent and his father owned the Louisville Cooler Manufacturing Company, which produced walk-in refrigerators (TE 37 and 74; 194 and 241).

Around 1968 (TE 195), the decedent founded a corporation in Columbus, Ohio called One-Stop Food Marts, the purpose of which was to build and operate Convenient-type food markets on leased land, with the Louisville-based Fetzer Corporation to build the stores, and the appellee, Fetzer Refrigerator Company, to supply the equipment for the stores (TE 196-199). However, in the spring of 1970 (the year decedent died), financial problems developed with the One-Stop Food Marts corporation (TE 200).

The decedent then formed an Ohio corporation called Fetzer Leasing Company (TE 47-48, 201-202) which contracted for a $180,000 loan from a New York-based company named Equilease Corporation (TE 200). The promissory note for this loan was co-signed by the appellee, Fetzer Refrigerator Company, and by the Louisville Cooler Manufacturing Company, and also by the decedent personally (TE 204-205). The transaction was closed in June of 1970 (TE 201 and 203). However, this loan only enabled the One-Stop Food Mart corporation to operate four (or half) of its stores, and therefore, was not enough money to solve its financial problems (TE 208). Later, a $65,000 loan was obtained for one of its stores from the C.I.T. Corporation, also co-signed by the appellee, Fetzer Refrigerator Company (TE 50 and 210).

Nevertheless, the unpaid debts continued to mount during the summer of 1970 (TE 209), and in the fall the decedent began to talk to many prospective lenders; however, he was unsuccessful (TE 211-212). In October of 1970, the decedent attempted to sell the entire Ohio operation to Nite Owl Food Marts (TE 212-213); however, the Nite Owl officials decided during the first part of November, 1970, that they were definitely not interested (TE 216). On November 12, 1970, the owner of the land on which two of the eight One-Stop stores were located, gave notice that he was foreclosing on the leases because of a default in payments (TE 217-218).

In desperation, the decedent placed an advertisement in the Wall Street Journal, which read as follows: (TE 219)

> "Investment Opportunity. Need $500,000 to retire long term debt, expansion and for operating capital. 3 to 1 Convenient Grocery, Fast Foods and Gasoline, 7 store operations with expansion plans. O.T.C.-S.E.C. approved Delaware, Corporation. Tax loss available. Present sales 2 million per year, growing Central Ohio locations. Willing to merge. Call Norris (502)583-2744 or write 209 E. Main Street, Louisville, Ky. 40202."

On November 17, 1970, the decedent's One-Stop Food Marts corporation went into bankruptcy with debts totalling approximately $3,000,000 (TE 222). On the day before the decedent's death, November 23, 1970, the decedent met with Jack Metcalf, general manager of the Fetzer Corporation (and later executor of the decedent's will, TE 234) to discuss the financial crisis. Mr. Metcalf described the meeting (TE 224):

> ". . . We left the office. Mr. Fetzer was very upset. His brother had been in the hospital the month prior which disturbed him greatly with what was then termed in Mr. Fetzer's words terminal cancer, . . . He was very upset over this. His father had been in the hospital that month prior. He wanted to get out of the office. Neither of them knew of any of this happening [to] One-Stop in Columbus. He had not told any of them of this. . . ."

The decedent then went wtih Mr. Metcalf to consult with two local attorneys, who told the decedent, "My God, you have created a bucket of worms here" (TE 226). Mr. Metcalf said of the decedent, *"It is the first time in my life I have had him show any outside emotion. He was very good at covering up the inner self"* (TE 228). The two men agreed that the decedent should return to the office the next morning to tell the decedent's father, Mr. Clifford Fetzer, of the fiancial mess; however, Mr. Metcalf never saw the decedent again (TE 228).

The next day, the decedent arose at his usual time (TE 314), ate a very light breakfast (TE 317), and left his house while it was still dark (TE 316). His wife (the appellant) noticed his car lights "linger just a little bit longer than usual and, of course, the first thing I thought was, well, he is in trouble . . ." (TE 316-317).

At approximately 10:00 A.M. on this fatal morning, Detective Sergeant Robert Mathena of the Jefferson County Police Department was working the day shift and drove through Cox's Park on River Road. He

noticed only one car in the park with a man and a woman inside, and this car followed Sergeant Mathena's car out of the park (TE 90-91). Approximately ten to fifteen minutes later, Sergeant Mathena received a radio dispatch to make an emergency run back to Cox's Park. He arrived back at the park approximately four minutes later and observed the decedent's body on the ground next to the decedent's automobile (TE 92). Except for the two men who reported the incident to the police, nobody else had been observed around Cox's Park at the time (TE 93). The decedent was lying face down on the ground—dead—with blood coming out of the side of his head (TE 94). There was a large pool of blood on the ground (TE 99). Although it was a "real cold" day (TE 90) the body was still warm (TE 96). Beneath the decedent's body in his right hand was a .45 caliber automatic pistol (TE 100 and 131), which the decedent had owned since his discharge from the armed services nearly twenty years ago (TE 327 and 331). The gun belt and holster were found inside the decedent's automobile (TE 98). One spent shell casing for this pistol was found on the ground near the body (TE 154-155) and there was a round of bullets in the chamber of the pistol (TE 154). In the front seat of the automobile were papers indicating that the decedent was attempting to obtain a half million dollar loan to relieve his financial problems (TE 174 and 184). The decedent's clothing was not ruffled or disheveled in any way; there was no indication that this body had been dragged there from some other place; and there was no evidence of blood smears on the ground or on

the body (TE 99-102). All of the experienced officials who investigated the matter concluded positively that the decedent had commited suicide (TE 62-63; 85-86; 122-123; 147-148; 168-169).

At the conclusion of the evidence, the jury found that the decedent intentionally took his own life (TE 497). His former wife now appeals this verdict and judgment.

ARGUMENT

1. The Trial Court Did Not Err in Refusing to Grant a Continuance, Because the Insurance Claim Papers Were Not Essential to This Case, Were Sought Only Two Weeks Before Trial, and Were Not in the Possession of the Appellee.

On May 21, 1975, the appellant took the deposition of the decedent's father, Mr. Clifford Fetzer. (A copy of all depositions were designated by the appellee to be included in the Record on Appeal TR 183). At page 29 of this deposition, appellant's counsel asked Mr. Fetzer:

> "Q. 125. Well, I'm going to request you now, Mr. Fetzer, to examine the records of Fetzer Refrigerator Company and deliver to your attorney all claims or any other papers relating to insurance policies on the life of Norris, including any payments made to Fetzer Refrigerator Company as a result of the death of Norris.
>
> A. We will be tickled to death to give you the records if we received any money.
>
> Q. 126. Did Fetzer Refrigerator Company along with Martha, and Fetzer Corporation, retain an attorney to file suit against two separate insur-

ance companies on policies covering the life of Norris after his death?

A. Did the refrigerator company, you say?

Q. 127. Yes?

A. The refrigerator company did not. You mean did the refrigerator company instigate this?

Q. 128. Yes?

A. I want to say that we did not. It was Martha first, Dick Applegate and Jack Metcalf.

Q. 129. Were any of these three officers of Fetzer Refrigerator Company?

A. No, no."

At page 41 of this deposition, Appellant's counsel stated to Mr. Fetzer:

"Q. 176. Will you check the records of Fetzer Refrigerator Company with respect to any papers involving claims or negotiations or settlements or receipt of proceeds or any other documents relating to insurance claims arising out of the death of Norris?

Mr. Blackburn: We will check—."

The record further shows that Mr. Fetzer did check the records of Fetzer Refrigerator Company and could not find any of the papers requested by the appellant; furthermore, the record shows that the appellant, Martha Wells, was an instigating party to the insurance claim suit (TE 88-102) and had just as much access to, and information concerning, the records she sought as did Mr. Clifford Fetzer (TR 131-132). If the appellant did not have all of the papers relating to the suit

that she filed, she could have obtained such papers from one of the other parties to that action, or from her attorney (Mr. Bruce Hamilton), and the trial court correctly refused to grant her a continuance when the appellant did not begin asking for these papers until two weeks before the assigned trial date—although she had filed her suit against the insurance company nearly *four years earlier* (TR 88), and had executed the insurance claim forms even before that. At best, these insurance papers were merely "cumulative" evidence, which had no bearing on the question of the decedent's suicide.

Furthermore, CR 43.03 requires that an affidavit in support of a motion for a continuance must show: (1) the materiality of the evidence expected to be obtained, and (2) that due diligence has been used to obtain it. The appellant's affidavit in support of a continuance does not specifically show the materiality of this alleged evidence—it merely states that "these papers are necessary and important in the preparation of this action . . ." (TR 125). The averments of the appellant's affidavit were negated by the affidavit filed in behalf of the appellee (TR 131-132) and by the deposition itself.

> ". . . An application for a continuance is addressed to the sound discretion of the trial court and unless the discretion has been abused the action of that court will not be disturbed." *Wells* v. *Salyers,* Ky., 452 S. W. 2d 395-396.

2. The Trial Court Correctly Submitted to the Jury the Sole Question Raised by the Pleadings and Evidence.

In remanding this action to the trial court, this Court stated, 512 S. W. 2d 938 at 940:

> ". . . The pleading by Fetzer Refrigerator Company *that Norris commited suicide* presented a factual situation to the court which was not resolved, and therefore the summary judgment was erroneous". (Emphasis supplied.)

The sole question involved in this entire case was whether or not the decedent intentionally took his own life. If he did, then the appellant lost her case; if he did not, then the appellant won her case because if the decedent's death was not intentionally self-inflicted, it would not matter then exactly how he died—whether by murder or by accidental death.

The two-page, nine-paragraph instructions tendered by the appellant were totally unnecessary—both in length and in substance, and would have confused the jury. As stated by Judge Stanley:

> "The instructions should be so clear, concise and definite as to present concretely the issues . . . in such a way as will be readily within the comprehension and understanding of the jurors, who are not ordinarily educated in the law or its terminology. . . ." 1 STANLEY, INSTRUCTIONS TO JURIES, §17 at page 32.

The appellant cites several cases in support of her contention that there should have been an accidental death instruction, *inter alia.* All of these cases are

clearly distinguishable. The first case, *Commonwealth Life Insurance Company* v. *Hall,* Ky., 517 S. W. 2d 488, involved four insurance policies which provided for a payment of a total sum of: (a) $53,000 in the event of an *accidental death;* (b) $20,000 in the event of a *non-accidental* death; or (c) no money in the event of *suicide.* This Court held that the evidence—essentially similar to that in the case at bar—did not justify a finding of *accidental death,* and therefore the jury could only conclude (1) that there was a non-accidental death, or (2) that there was a suicide. This Court, therefore, concluded, 517 S. W. 2d 488 at 494:

> ". . . [T]he only question that should have been submitted to the jury is whether it believed from the evidence that the insured intentionally killed himeslf."

This is precisely the question involved in this Fetzer case at bar, and this is precisely the question that was submitted to the jury (TE 497). In this case, there is no insurance policy providing for payment of different sums in the event of different kinds of death. There is only a personal service contract. If the decedent intentionally took his own life, this personal service contract is no longer binding on the appellee, Fetzer Refrigerator Company; however, if the decedent did *not* intentionally kill himself, then the appellant recovers under the contract—regardless of exactly how the decedent actually met his death (see TR 176).

In *Pacific Mutual Life Insurance Company* v. *Fagan,* 292 Ky. 533, 166 S. W. 2d 1007, cited at page 10 of the Brief for Appellant, an insurance policy provided for payment where death was by *accidental means.* There was no evidence that the minor decedent had commited suicide because all witnesses present at the shooting stated that the decedent minor was playing Russian roulette in jest; that the pistol discharged as he was removing it from his head with the apparent intention to discontinue the demonstration; and that a look of surprise registered on his face when the gun discharged. This Court, therefore, stated, 166 S. W. 2d at 1010;

> ". . . Whilst it must be conceded that the absence of suicidal intent does not in all cases necessarily establish the fact that the decedent came to his death by accidental means, nevertheless, the facts and circumstances proven in this case *authorize a finding of no other alternative. . . .*" (Emphasis supplied.)

In the Fetzer case at bar, on the contrary, there was no separate provision in the personal service contract for death by *accidental means;* it comprehended *any* kind or death—except intentional self-destruction. (Nor is there any evidence whatever of an accidental death.) The only question involved in this case is whether or not the decedent intentionally killed himself. Whether he was murdered, or whether he died an accidental death, are of no significance because his wife would then automatically be entitled to a judgment. To paraphrase this Court in *Fagan, supra,* 166 S. W. 2d at 1011:

". . . 'These instructions are models of brevity and simplicity, and are certainly as favorable to appellant as it was entitled to have'.

"Where the instructions given embrace all of the law of the case, one has no just cause of complaint because the court refuses to amplify the law so given. . . ."

At page 1011 of her brief, the appellant quotes from *Donohue* v. *Washington National Insurance Company,* 259 Ky. 611, 82 S. W. 2d 780. However, the appellant omitted from the quotation on page 11 of her brief this essential clause immediately preceding the quoted matter:

"We find the general trend of authority to be as stated in the case of United States Mutual Accident Association v. Barry, 131 U. S. 100, 9 S. Ct. 755, 762, 33 L. Ed. 60, 'that if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; . . . '" *Supra* 82 S. W. 2d at 782.

Indeed, this Court went on to say as follows:

" 'An effect which is the natural and probable consequence of an act or course of action is not accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds . . .'" *Supra* 82 S. W. 2d at 783.

This quotation is singularly appropriate to the Fetzer case at bar. Considering the circumstances surrounding the decedent on the day of his death—his

business in Ohio was bankrupt with $3,000,000 in debts (TE 222); his father's Louisville businesses were co-signers on substantial loans for these Ohio business operations (TE 50, 204-205, 210); and, on the day of his death, the decedent was to meet with his father and tell him the bad news (TE 227-228)—only those persons determined to resist the natural inferences from the proven facts could doubt that the decedent's death from his own service revolver (clutched in his hand beneath his body) was the "result of actual design" or that the decedent "must be held to intend the natural and probable consequences of his deeds".

The old case of *St. Louis Mutual Life Insurance Company* v. *Graves,* 69 Ky. (6 Bush) 268, from which the appellant quotes at pages 12 and 13 of her brief, consisted of two separate written opinions—one concurred in by two members of the four-judge Court of Appeals, while the other opinion was concurred in by the remaining two members of the Court. The first opinion (from which the appellant quotes) seems quite taken with two theories—one labeled "intellectual insanity" and the other referred to as "moral insanity." On the other hand, the second opinion by Chief Justice Williams (concurred in by Judge Hardin) takes issue with nebulous theorizing—especially "moral insanity," and states, *supra* 69 Ky. at 281:

> ". . . In all the vague, uncertain, intangible and undefined theories of the most impracticable mataphysician on psychology and moral insanity, no court of last resort in England or in America . . . ever before announced such a startling, irrespon-

> sible and dangerous proposition of law. For if this be law, then no longer is there responsibility for homicide, unless it be perpetrated in calm, cool, considerate condition of mind. . . . Had Graves [the suicide] killed another under the circumstances developed in this case, we should enter our most solemn protest against his exoneration from responsibility. . . ."

This statement applies to the case at bar. Would this Court permit the jury in this action to receive superfluous instructions by which it could speculate on many fanciful theories, including "intellectual insanity", "moral insanity," murder by some clever phantom, or "accidental" death by falling on a pistol?

In passing, it should be noted that the appellant has referred to certain testimony by a Dr. Hidir Babaturk, who had completed his psychiatric training on May 14, 1975—a couple of weeks before the trial of this action. Dr. Babaturk was not present at the investigation of the decedent's death in 1970, never knew the decedent or anything about him, and had never heard of him until ten days before the trial (TE 417). Dr. Babaturk merely talked to the decedent's wife and daughter, and a couple of other persons who knew the decedent (TE 417), read some texts (TE 415), and concluded that decedent's death could have been "accidental" or "non-intentional" (TE 407). This testimony—based upon hearsay gleaned from text books and interested parties—was of very questionable competency. In *United States* v. *American Tobacco Co.*, (E. D. Ky. 1941), 39 F. Supp. 957, Judge Hiram Church Ford excluded certain expert testimony, stating at 958:

> "Before an expert opinion resting upon a hypothetical basis may be received as evidence, the facts constituting the basis of the opinion must be disclosed and their existence supported by evidence . . . 'While the courts will give wide latitude to the reception of expert opinion evidence, we think it axiomatic that it must be based upon conceded or proved facts, and that a naked opinion, based obviously on mere speculation and conjecture does not rise to the dignity of evidence, * * *.'
>
> ". . . An expert opinion is not admissible in evidence when its factual foundation is nebulous. . . ."

The testimony of Dr. Hidir Babaturk, based upon hearsay observations by others, should not have been afforded any weight. See also, *Equitable Life Assur. Soc.* v. *Kazee,* 257 Ky. 803, 79 S. W. 2d 208 at 210. Indeed, Dr. Babaturk admitted that this was the first time he had ever attempted to psychoanalyze any person without interviewing that person (TE 418). This Court's opinion should make certain that this is the last time that the doctor is encouraged to do such a thing.

3. The Trial Court Exercised a Sound Discretion in Permitting in Evidence Photographs of the Suicide.

Several photographs were taken of the decedent *exactly as he was found* at the time of his death. These photographs are more accurate than a thousand words of descriptive testimony concerning the fact that Norris Fetzer had died as a result of a gun shot wound in-

flicted by him, and are good evidence under the applicable general rule concerning their admission.

> "It is well established that photographs of persons, things, and places, when duly verified and shown by extrinsic evidence to be faithful representations of the subjects as of the time in question, are admissible in evidence, both in civil and criminal cases, . . ." 29 AM. JUR. 2d, *Evidence,* §785 at page 856.
>
> ". . . [I]f photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to that extent, calculated to excite passion and prejudice, does not render it inadmissible in evidence.
>
> "When a photograph is offered the tendency of which may be to prejudice the jury, its admissibility lies in the sound discretion of the court. It may be admitted if its value as evidence outweighs its possible prejudicial effect, or may be excluded if its prejudicial effect may well outweigh its probative value." *Supra,* 29 AM. JUR. 2d, *Evidence,* §787 at page 861.

This Court has consistently approved the admission of undistorted photographs of a decedent (or any other pertinent subject) in recent civil and criminal cases. *Geary* v. *Commonwealth,* Ky., 503 S. W. 2d 505 at 509; *City of Louisville* v. *Yeager,* Ky., 489 S. W. 2d 819 at 820-821; *Rodgers* v. *Commonwealth,* Ky., 470 S. W. 2d 605 at 607; *Grissom* v. *Commonwealth,* Ky., 468 S. W.

2d 263 at 266; *Faught* v. *Commonwealth,* Ky., 467 S. W. 2d 322 at 325; *Garr* v. *Commonwealth,* Ky., 463 S. W. 2d 109 at 114; *Parker* v. *Commonwealth,* Ky., 461 S. W. 2d 86 at 88; *Johnson* v. *Commonwealth,* Ky., 445 S. W. 2d 704 at 706; *Jaggers* v. *Commonwealth,* Ky., 439 S. W. 2d 580 at 583; *Service Lines, Inc.* v. *Mitchell,* Ky., 419 S. W. 2d 525 at 531; *Commonwealth, Dept. of Highways* v. *Arnett,* Ky., 390 S. W. 2d 187 at 189-190.

In *Carson* v. *Commonwealth,* Ky., 382 S. W. 2d 85, *cert. den.* 380 U. S. 938, 85 S. Ct. 949, 13 L. Ed. 2d 825, this Court pointed out, 382 S. W. 2d at 90:

> ". . . It is well-settled that photographs are admissible in criminal cases, usually on the same basis as in civil actions. Even though the admission of a photograph may arouse passion or bring to mind vividly the details of a shock crime, if the picture serves to illustrate a material fact or condition, it is considered admissible. 20 Am. Jur., *Evidence,* §727, 728; 159 A.L.R. 1413, et seq; 2 Wharton's Criminal Evidence, §686.
>
> "What has just been said as to the admission of the photograph of the appellant is likewise applicable as to the introduction of the picture of the victim, Bobby Young. . . ."

Again, in *Deskins* v. *Commonwealth,* Ky., 512 S. W. 2d 520, this Court affirmed a murder conviction resulting in life imprisonment, stating at 527:

> "Finally, Deskins contends that the trial court erred by allowing the introduction in evidence of photographs of the decedent. All the photographs were taken at the scene of the crime and revealed the nature of the wounds and the position of the decedent at the time she was found by the officers.

> In this advanced technical age of television, movies and the news media, those persons selected as jurors are able to view a picture of the body of a victim of crime without prejudice to the defendant. Napier v. Commonwealth, Ky., 426 S. W. 2d 121 (1968). We hold that the photographs were competent evidence of the fact that murder had been commited and that Gladys Deskins had died as a result of the gunshot wound."

Similarly, to paraphrase the Court in that case, the photographs of the decedent in this action were competent evidence of the fact that suicide had been commited and that Norris Fetzer had died as a result of a gunshot wound inflicted by him.

The cases relied upon by the Appellant do not support her contention. In *Haddad* v. *Kuriger,* Ky., 437 S. W. 2d 524, the photograph was taken *two or three days after* the accident and prominently displayed a *tracheotomy incision* which the plaintiff had received at the hospital. This Court stated at 525:

> "The photograph is an extreme close-up, so much so as to present a distorted perspective. It appears to have been designed purposely to depict the child's injuries in the worst possible light; to emphasize them by presenting a view such as would be had only by a person putting his face within a few inches of the child's. Thus, the gruesome appearance is enhanced. The lighting and coloring do not appear normal. . . ."

In *Freeman* v. *Oliver M. Elam, Jr. Company,* Ky., 372 S. W. 2d 796, cited on page 14 of the Brief for Appellant, this Court pointed out at 798:

". . . Appellee's objection to admission [of the photographs] was that there had been a *substantial change in condition* before the pictures were taken . . ." (Emphasis supplied.)

There is no contention—nor could there be—in the case at bar that there was a *change in condition* by the time the photographs were taken, or that the photographs are *distorted.*

CONCLUSION

The trial court conducted the trial of this action in complete fairness to the appellant. Indeed, the appellee submits that the court was *too* fair to the appellant, because it excluded the conclusions of the investigating police officers that this was clearly a suicide (TE 62-63; 85-86; 122-123; 147-148; 168-169). The court submitted to the jury the only question raised by the pleadings and evidence, i.e., whether the decedent intentionally took his own life. The jury decided this question adversely to the appellant, and now, after two appeals, she has now had her "day in court". The verdict and judgment should be affirmed.

Respectfully submitted,

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